

¹ Since the Board took jurisdiction over this case on January 18, 2005, the decision rendered by the Office on February 15, 2005 on the same issue is hereby null and void. The Board and the Office may not simultaneously have jurisdiction over the same issue in the same claim. *See Douglas E. Billings*, 41 ECAB 880 (1990); *see also* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On March 10, 2004 appellant, then a 52-year-old mail processing clerk, filed a Form CA-2 claim for occupational injury alleging that on or about September 22, 2003 she became aware that she had injured her left hand and arm up to her shoulder. She attributed her condition to separating mail, lifting sacks, pushing and pulling rolling stock and vibrations. Appellant claimed that whenever she finished her shift she had left-sided shoulder, arm and hand pain, achiness, tingling, numbness and discomfort.

On March 15, 2004 the employing establishment controverted appellant's claim, noting that she failed to submit any medical evidence to support her alleged condition.

By letter dated April 2, 2004, the Office requested that appellant submit medical evidence in support of her claim.

Appellant submitted an April 12, 2004 report from Dr. Fernando G. Diaz, a Board-certified cardiovascular surgeon, who noted in part:

"She suffered a work-related injury in 1993. Apparently while pulling carts and working with vibrating tools, she developed pain in the hands and upper extremities. This resulted in an evaluation by Dr. Burke who found [appellant] to have evidence of bilateral ulnar nerve entrapment which required ... bilateral ulnar nerve transpositions completed in 1996 and 1997. She had continued to have some arm pain but was able to maintain her job.... Apparently in September 2003 she was transferred to a newspaper section ... [where] she is required to lift packages weighing anywhere between 20 pounds and 50 pounds from the line and throw them into different bins over her head. The work is repetitive and apparently over the course of several months, it produced the aggravation of bilateral upper extremity pain and neck pain. The pain radiates from the cervical region into the left upper extremity along the lateral aspect of the shoulder, arm and forearm."

Dr. Diaz examined appellant, reviewed a February 17, 2003 magnetic resonance imaging (MRI) scan, and reported that it revealed a moderate-sized disc herniation at C5-6 compressing the left nerve root and a smaller disc herniation at C6-7 compromising the left lateral recess. He stated:

"I believe [appellant's] condition was aggravated by the change in job occupation that she undertook in September 2003. The repetitive multiple trauma of lifting the heavy packages over her head, bending over the line and apparently she has to push a U-cart with mail that weighs up to 40 pounds to 50 pounds repetitively. This probably aggravated her condition. She has most likely a herniated disc at C5-6 and C6-7 which was most likely aggravated by her change in occupation."

By decision dated May 24, 2004, the Office denied appellant's claim finding that there was insufficient medical evidence relating her cervical condition to employment factors. The

Office noted that the observation of Dr. Diaz changing jobs, repetitive lifting over the head, bending and pushing “probably aggravated” her condition was speculative and did not fully address how her federal employment caused or aggravated her herniated discs. Further, the Office found Dr. Diaz’s opinion was equivocal as he stated that she had “most likely” had a herniated disc that was “most likely” aggravated by the change in her occupation.

On November 16, 2004 appellant requested reconsideration of the March 24, 2004 decision. She submitted a copy of Dr. Diaz’s April 12, 2004 report.

By decision dated November 30, 2004, the Office denied reopening appellant’s claim for a further review on its merits. The Office found that there was no evidence sufficient to warrant reopening of appellant’s case for further review.

LEGAL PRECEDENT -- ISSUE 1

To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee must submit the following: (1) medical evidence establishing the presence or existence of a condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the condition; and (3) medical evidence establishing that the employment factors identified by the employee were the proximate cause of the condition or illness for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.²

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician’s rationalized medical opinion on the issue of whether there is a causal relationship between an employee’s diagnosed conditions and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed conditions and the specific employment factors identified by the employee.³

The Board notes that the fact that a condition manifests itself or worsens during a period of employment does not raise an inference of an employment relationship.⁴ The Board further notes that conclusory opinions, without supporting rationale, are of little probative value.⁵

² *Donna L. Mims*, 53 ECAB 730 (2002).

³ *Id.*

⁴ *See Michael E. Smith*, 50 ECAB 313, 317 (1999).

⁵ *See Richard Giordano*, 36 ECAB 134 (1984).

ANALYSIS -- ISSUE 1

The Board finds that appellant has failed to establish her occupational disease claim, because the medical evidence she submitted in support was conclusory and couched in speculative language, which diminished its probative value. Further it had no medical rationale explaining the causal relationship with employment factors or the biomechanical process involved.

To support her claim of employment-related injury, appellant submitted an April 12, 2004 report from Dr. Diaz, who stated that appellant's work was repetitive and apparently over the course of several months, it produced the aggravation of bilateral upper extremity and neck pain. He did not, however, identify what appellant's implicated work-related repetitive tasks were, and he was vague about causation, stating that it produced pain over the course of several months, without identifying the dates involved or how many months were involved. Dr. Diaz also opined, without explanation, that he believed appellant's condition was aggravated by the change in jobs in September 2003, but he did not explain the process involved in this aggravation. Dr. Diaz speculated that appellant's duties "probably aggravated" her condition, and that she "most likely" had a herniated disc which was "most likely aggravated" by her change in occupation. This opinion is speculative, using equivocal terms such as "probably aggravated," and "most likely aggravated."

Dr. Diaz's report is equivocal on the issues of diagnosis and causal relationship with specific employment factors. He failed to explain the process involved in the aggravation of appellant's upper extremity or neck pain, his report is unrationalized and of reduced probative value, such that it is insufficient to establish appellant's occupational disease claim.

Appellant has, therefore, failed to provide medical evidence to establish the presence or existence of a condition for which compensation is claimed, a factual statement identifying the employment factors alleged to have caused the condition, and medical evidence establishing that the employment factors identified were the proximate cause of the condition for which compensation was claim. She has therefore failed to provide evidence sufficient to establish her claim.

CONCLUSION -- ISSUE 1

The Board finds that appellant has failed to establish that she sustained an occupational injury in the performance of duty causally related to factors of her federal employment.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁶ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) provide relevant and pertinent new evidence that was

⁶ 5 U.S.C. § 8101 *et seq.* Under section 8128 of the Act, "[t]he Secretary of labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

not previously considered by the Office.⁷ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for further review on the merits.⁸

Additionally, the submission of repetitive or cumulative medical evidence previously considered does not constitute a basis for reopening a claim.⁹

ANALYSIS -- ISSUE 2

The Board finds that the Office properly declined to reopen appellant's case for further reconsideration of her claim on its merits.

Although appellant requested reconsideration of the May 24, 2004 decision, she failed to submit any probative medical evidence to support her request. Appellant failed to show that the Office erroneously applied or interpreted a specific point of law; failed to advance a relevant legal argument not previously considered by the Office; and failed to provide relevant and pertinent new evidence that was not previously considered by the Office.¹⁰ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for further review on the merits.¹¹

In support of her reconsideration request, appellant submitted a copy of Dr. Diaz's April 12, 2004 report which had previously been submitted to the record and considered by the Office in preparation for its May 27, 2004 decision. At that time the Office had found that the April 12, 2004 report was insufficient to establish appellant's claim. Therefore, the report is not now relevant and pertinent new evidence that was not previously considered by the Office, and its resubmission is no basis upon which to warrant reopening a case for reconsideration on its merits.

In this case, appellant failed to submit any evidence or argument in support of her reconsideration request, such that the Office was required to deny the application without reopening the case for further review on its merits.

CONCLUSION

The Board finds that the Office properly denied appellant's request for merit review of its May 24, 2004 decision under 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ 20 C.F.R. § 10.608(b).

⁹ *W.H. Van Kirk*, 28 ECAB 542 (1977).

¹⁰ 20 C.F.R. § 10.606(b)(2).

¹¹ 20 C.F.R. § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 30 and May 24, 2004 are hereby affirmed.

Issued: July 22, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board